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No. 03-1457

In The

Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a Longshore employer avoid liability for disability even when the employment caused a permanent worsening and hastened the need for treatment?

CORPORATE DISCLOSURE STATEMENT

In accordance with Rules 14.1 and 29.6 of this Court, Crescent Wharf & Warehouse Company reports that it has no parent companies and no subsidiaries that are not wholly owned.

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RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*

Respondent Crescent Wharf & Warehouse agrees that this Court should review the judgment of the United States Court of Appeals for the Ninth Circuit. Although the Ninth Circuit reached the correct result in this case, it was reached for the wrong reasons, and the decision by the Ninth Circuit is in direct contradiction to the previous decisions of the United States Supreme Court.

This Court has held that the Longshore Act provides compensation for disability, which has an economic as well as a medical component. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 115 S.Ct. 2144 (1995). Disability is defined by the Longshore Act as incapacity, because of injury, to earn wages which the Employee was receiving at the time of injury in the same or other employment. For certain scheduled injures, the statute creates a conclusive presumption of incapacity to earn wages. This case is such a scheduled injury resulting from cumulative occupational trauma.

This Court has applied this definition of disability in the occupational trauma setting before. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692 (1993). In *Bath*, the Supreme Court found that cases of occupational trauma such as hearing loss, where symptoms present simultaneously with the occurrence of trauma, are subject to the conclusive presumption of incapacity to earn wages. The Supreme Court then utilized the holding and analysis from *Bath* in its subsequent decision of *Metropolitan Stevedore Co. v. Rambo (Rambo I)*, 515 U.S. 291, 115 S.Ct. 2144 (1995); *Metropolitan*

Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121, 117 S.Ct. 1953 (1997).

The United States Court of Appeals for the Ninth Circuit, in this case, found that the scheduled injuries to Longshoreman Price were the responsibility of Metropolitan Stevedore Company, the employer at the time of the last injury. In so doing, however, the Ninth Circuit applied a definition of disability which focuses entirely on the physical injury and ignores the economic component of disability. This diversion from prior holdings of this Court should not be allowed to stand. As this Court has always found, disability must be both economic and physical in order to result in an award of compensation. The last employer to cause injury which contributes to that disability, both physically and economically, is responsible for payment of compensation. In this case, that employer is Metropolitan Stevedore Company.

RELEVANT STATUTORY PROVISIONS

Section 2(2) of the LHWCA, 33 U.S.C. § 902(2), provides:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Section 2(10) of the LHWCA, 33 U.S.C. § 902(10), provides:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2).

Section 8(c) of the LHWCA, 33 U.S.C. § 908(c), provides:

> Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:
>
> (1) Arm lost, three hundred and twelve weeks' compensation.
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
>
> (3) Hand lost, two hundred and forty-four weeks' compensation.
>
> (4) Foot lost, two hundred and five weeks' compensation.
>
> (5) Eye lost, one hundred and sixty weeks' compensation.
>
> (6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: (A) Compensation for loss of hearing, of one ear, fifty-two weeks. (B) Compensation for loss of hearing of both ears, two hundred weeks. (C) An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (I) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced. (D) The time for filing a notice of injury, under section 12 of this Act, or a claim for compensation, under section 13 of this Act, shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

* * *

(21) Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In any case in which there shall be a loss of, or loss of use of more than one member or parts of more than one member set forth in paragraphs (1) to (19) of this subdivision, not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or part thereof, which awards shall run consecutively, except that where the injury affects only two or more digits of the same hand or foot, paragraph (17) of this subdivision shall apply.

Section 8(h) of the LHWCA, 33 U.S.C. § 908(h), provides:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision

> (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

Section 10(i) of the LHWCA, 33 U.S.C. § 910(i), provides:

> For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

STATEMENT OF THE CASE

Longshoreman William Price claimed to have suffered cumulative trauma to his knees, which continued to get progressively worse with each day of work, up to and including his last day of employment at Metropolitan

Stevedore Company. Price asserted that Metropolitan Stevedore Company was responsible for his injuries and brought a claim pursuant to the Longshore Act against Metropolitan Stevedore Company. In turn, Metropolitan alleged that although Claimant indeed did suffer cumulative trauma to his knees through his last day of employment, that some trauma other than that which occurred at Metropolitan Stevedore Company was wholly responsible for Claimant's disability.

Price had been receiving treatment for his longstanding knee problems for years prior to his last day of work. Although surgery had been recommended, Price continued working over a year and a half until ultimately having surgery. Price suffered increasing pain with work activities up through his last day of employment at Metropolitan Stevedore Company after which he finally obtained the recommended surgical procedure.

At trial, evidence was presented to the Administrative Law Judge from Claimant's treating surgeon, who testified that Claimant's condition continued to deteriorate with ongoing activities up to and including his last day of employment. Two other testifying orthopedic surgeons supported the testimony of Dr. Williams that the final trauma occurred during work at Metropolitan.

After hearing the evidence, the Administrative Law Judge credited the opinions of the three testifying orthopedic surgeons and found that the deterioration was a continuous process which did not stop until after the actual surgery took place. The work aggravations continued to decrease Claimant's ability to be ambulatory, caused more pain, and increased the need for surgery. The Administrative Law Judge found that Metropolitan Stevedore Company permanently increased Claimant's pre-injury disability, and hastened

the need for surgery, and that Claimant was entitled to compensation pursuant to Sections 908(c)(4) and 908(c)(19) of the Longshore Act.

The Benefits Review Board affirmed the ALJ, ruling that the Findings of Fact and Conclusions of Law by the Administrative Law Judge were rational, supported by the substantial evidence and in accordance with the law. The Benefits Review Board also affirmed the Administrative Law Judge's decision that Metropolitan was the responsible employer.

The Ninth Circuit affirmed the holding of the Administrative Law Judge and the Benefits Review Board. In so doing, the Ninth Circuit correctly found that Metropolitan was the last employer to contribute to Price's disability. The Ninth Circuit found there was substantial evidence to support the findings of the Administrative Law Judge.

> "The ALJ weighed all the evidence and determined that injury suffered during Price's April 22, 1995 employment with Metropolitan caused some minor, but permanent, increase in the extent of his disability and increased his need for knee surgery, even though the surgery had already been scheduled. The ALJ relied on doctors' testimony that there was a gradual loss of knee bone and cartilage each day Price worked. Since Price was still able to do his job to some extent the day before surgery, he had not progressed to the point of maximum disability, i.e., total inability to use his legs. There was a gradual wearing away of the bone, even on the last day before surgery, so his employment with Metropolitan caused a marginal increase in the need for surgery."

The Ninth Circuit, however, inexplicably departs from the well-settled definitions of disability and proceeds to articulate a new test for determining disability and causation.

> "In occupational disease claims, it is necessary to define disability in terms of loss of earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the disease with the particular points in time or specific work experiences. However, cumulative trauma injuries are not necessarily fraught with the same inherent ambiguity, and can be correlated more directly with identifiable work activities at particular times. *It is unnecessary and undesirable to use diminished earning capacity as the identifying feature of the disability in two injury cases.*" (Emphasis added).

The Ninth Circuit did not address why it departed from the previously well-settled law that disability has both physical and economic elements, other than to say that the contentions asserted by Metropolitan and the Director of the OWCP were not in accordance with the law.

A request for rehearing was denied by the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

Respondents Crescent Wharf & Warehouse agree with the Ninth Circuit that the ultimate result should be that Metropolitan is found liable. Such a finding is consistent with this Court's pronouncements regarding disability being both a physical and economic concept. All circuits

have, in turn, adopted some version of this holding to identify the last employer in situations of cumulative trauma. Unfortunately, when the Ninth Circuit departs from this definition, the decision also departs from the statutory language of the Longshore Act, and this Court's decisions in both *Bath Iron Works Co. v. Director, OWCP* and *Metropolitan Stevedore Co. v. Rambo (Rambo I and Rambo II)*.

Section 902(10) of the Longshore Act defines disability as: "The incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." The statutory definition, by its very terms, requires both injury and an incapacity to earn wages. In *Rambo*, this Court emphasized the appropriate definition for disability.

> "The LHWCA authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages. The Act speaks of this economic harm as disability, defined as the capacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10)."

Such incapacity is conclusively presumed for certain enumerated or scheduled injuries, which are compensated at two-thirds the worker's pre-injury wages over specified periods of time. See 33 U.S.C. § 908(c)(1-20); § 908(c)(22). For other so-called unscheduled injuries resulting in less than total disability, the Act sets compensation at 66 2/3 percent of the difference between the average weekly pre-injury wages of the employee and the employee's wage-earning capacity thereafter. 33 U.S.C. § 908(c)(21).

In *Bath Iron Works*, the Court found cases of occupational trauma were not subject to the occupational disease test, but instead were subject to the test articulated in *Rambo*. At the time the Court was specifically discussing hearing loss.

> "The injury, loss of hearing, occurred simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases. Under those circumstances, we think it quite proper to say that the date of last exposure – the date upon which the injury is complete – is the relevant time of injury. . . ."

The Ninth Circuit's definition of disability cannot be squared with the Supreme Court's pronouncements on the same issue. The Ninth Circuit has created its own definition of disability, which, in turn, conflicts with other circuits and with the Supreme Court. For this reason, until the decision is reversed, the definition of disability under the Longshore Act in the Ninth Circuit will be inconsistent with the statute, the circuits interpreting that statute, and the United States Supreme Court.

Metropolitan's Date Of Onset Test Is Not Appropriate For Scheduled Injuries

Metropolitan suggests a date of onset test because the LHWCA purportedly includes no mechanism for apportioning liability among employers in cases of cumulative trauma. Metropolitan seeks to have the Court find that the date of onset of disability is not equated with the final assault on the body, but instead occurs sometime prior to that point.

The Supreme Court has previously addressed the issue of occupational or cumulative trauma in *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692.

Initially, the *Bath Iron Works* Court found that compensation for permanent partial disability was determined in one of two ways. If the injury was of a kind specifically identified in the schedule set forth in § 908(c)(1-20) of the Act, the injured employee was entitled to two-thirds of his average weekly wage at the time of the injury for a specific number of weeks, regardless of whether his earning capacity had actually been impaired.[1] In all other cases, the Act authorized compensation equal to two-thirds of the difference between the employee's average weekly wage and his post-injury earning capacity. 33 U.S.C. § 908(c)(21). In those cases, unlike the scheduled injury cases in which the disability was presumed, it was necessary for the employee to prove that his injury had actually decreased his earning capacity.

The Court noted that Congress then added a third method addressing "claims for death or disability due to an occupational disease which does not immediately result in death or disability." 33 U.S.C. § 910(i). The time of injury was defined as the date on which the employee or claimant becomes aware, or " . . . should have been aware of the relationship between the employment, the disease, and the death or disability." The Director in *Bath Iron Works* argued that work-related hearing loss, unlike a

[1] Although the Court in that case was addressing loss of hearing, injuries to the legs are a specifically enumerated disability. 33 U.S.C. § 908(c)(2).

disease such as asbestosis, caused immediate disability. This Court found that occupational hearing loss does result in immediate disability because the injury occurs simultaneous with the exposure to excessive noise and is complete when the exposure ceases. This is consistent with cumulative trauma injuries, which are complete when the claimant stops working. Since the injury is complete with the last assault, in cases where economic loss is presumed because of an enumerated disability, the employer at the time of the last assault becomes the last employer to affect disability, and thus, the responsible employer.

Disability For Unscheduled Injuries Is Both A Physical And Economic Test

The Supreme Court on multiple occasions has articulated that in cases of injuries covered under Section 908(c)(21) of the Act, the compensation for injury resulting in less than total disability is calculated by determining the difference between the average weekly wage, pre-injury, and the employee's wage-earning capacity after injury. The Court in *Rambo* goes on to articulate that Section 908(h) of the Act defines wage-earning capacity.

> "Wage-earning capacity is to be determined by his actual earnings if such earnings fairly and reasonably represent his wage-earning capacity; provided, however, that if the employee has no actual earnings, or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Deputy Commissioner may, in the interest of justice, fix such wage-earning capacity shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other

> factors or circumstances indicates which may affect his capacity to earn wages in his disabled condition, including the effect of the disability as it may naturally extend into the future." 33 U.S.C. § 908(h).

By its very terms, the Act defines wage-earning capacity, an element of disability, as including in and of itself a requirement that the trier of fact give due regard to the nature of injury and the degree of physical impairment.[2]

Metropolitan and the Ninth Circuit both make similar mistakes in their argument. Metropolitan seeks to eliminate the physical aspect of disability and focus only on the economic diminution of earnings. The Ninth Circuit seeks to eliminate the economic aspect of the definition of earnings and focus solely on the physical aspects of disability. Both points of view, when discussing unscheduled injuries, are incorrect. This Court in *Rambo I, Rambo II* and *Bath Iron Works* has articulated that the standard includes two prongs, one prong which focuses on the diminution of earnings, and the other prong which focuses on both environmental and physical factors, including the resultant physical impairment which resulted from the injury itself.

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[2] In *Metropolitan v. Rambo*, Metropolitan sought to argue that the concept of disability should focus on only the economics of whether claimant's actual earnings show economic disability. The Supreme Court was not persuaded by that argument and, instead, found disability to include the concept of wage-earning capacity, which, by definition, includes the necessity to consider the physical harm of injury as an element of disability. Thus, Metropolitan seeks to posit the same core argument which has previously been rejected by this Court.

The language of the Supreme Court in *Rambo I, Rambo II* and *Bath Iron Works* is clear and unequivocal, that in cases of unscheduled disability, there is a two-prong test which must be applied without exception. That standard should be upheld by the Supreme Court here.

THE OCCUPATIONAL DISEASE TEST IS NOT APPLICABLE TO ORTHOPEDIC INJURIES

The Director, OWCP, essentially suggests that a version of the occupational disease rule would be the appropriate test. The Supreme Court addressed this argument in *Bath Iron Works* by drawing a distinction between injuries such as asbestosis, which do not immediately result in disability, and hearing loss, where each assault causes some injury, even if not measurable. The injurious effect of the injury in hearing loss does not continue after the exposure. Similarly, the trauma which causes orthopedic injury ceases when the injurious exposure ceases, i.e., when claimant stops working. The Ninth Circuit was correct in addressing the selection of an arbitrary date prior to the last exposure.

> "[The test would] introduce new uncertainty into the process of determining liability under the last employer rule. The inquiry would not be a straight-forward one: In this case, it might be the date surgery was first recommended, the date that Price finally agreed to surgery, the date the papers were filed, the surgery was finally scheduled, or the date Price signed the consent form."

In contrast, utilization of the Supreme Court's rule that the employer who last causes disability, is responsible for the whole of the disability, reduces this uncertainty.

While the consideration of the physical and economic aspects of disability might, in some instances, be difficult, such difficulty is not a good reason to abdicate the Supreme Court's pronouncement of the appropriate test for determining liability. Instead, the determination as to the responsible employment should rest with the trier of fact. In this case, the Administrative Law Judge carefully considered the medical evidence, and the evidence of disability, before concluding that the last injury, and last disability, was caused by Metropolitan. The confirmation of the test articulated in *Bath Iron Works*, and renewed in *Rambo I* and *Rambo II*, would result in conformity among the circuits and, ultimately provide more clarity to employers as to which one would be responsible for compensation to injured workers, thus ensuring a timely delivery of benefits.

CONCLUSION

Disability under the Longshore Act is both a physical and economic concept. The elimination of either element in the definition of disability causes uncertainty and confusion. While the Ninth Circuit correctly affirms the findings of the trial court that the final disability and injury occurs at Metropolitan, the departure from the Supreme Court definition of disability, which includes both economic and physical aspects, cannot be upheld.

Respectfully submitted,

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